

SHAWN D. PATTERSON)
)
 Plaintiff,) No. CV-11-00426-CI
)
 v.) ORDER GRANTING DEFENDANT'S
) MOTION FOR SUMMARY JUDGMENT
)
 CAROLYN W. COLVIN, Commissioner)
 of Social Security,¹)
)
 Defendant.)

¹Carolyn W. Colvin became the Acting Commissioner of Social Security on February 14, 2013. Pursuant to FED. R. CIV. P. 25(d), Carolyn W. Colvin is substituted for Michael J. Astrue as the defendant in this suit. No further action need be taken to continue this suit. 42 U.S.C. § 405(g).

1 Summary Judgment.

2 **JURISDICTION**

3 On October 27, 2008, Plaintiff filed a Title II application for
4 a period of disability and disability insurance benefits, alleging
5 disability beginning April 26, 2008. Tr. 18; 123. Plaintiff
6 reported that he could not work due to "head to toe nerve damage,"
7 "facial nerve damage," hearing loss, memory loss, chronic headaches,
8 and bilateral thoracic outlet syndrome. Tr. 128. Plaintiff's claim
9 was denied initially and on reconsideration, and he requested a
10 hearing before an administrative law judge (ALJ). Tr. 83-114. A
11 hearing was held on January 28, 2010, at which vocational expert
12 Richard Taylor and Plaintiff, who was represented by counsel,
13 testified. Tr. 38-82. ALJ James W. Sherry presided. Tr. 38. The
14 ALJ denied benefits on March 16, 2010. Tr. 18-32. The instant
15 matter is before this court pursuant to 42 U.S.C. § 405(g).

16 **STATEMENT OF THE CASE**

17 The facts of the case are set forth in detail in the transcript
18 of proceedings and are briefly summarized here. At the time of the
19 hearing, Plaintiff was 37 years old, and living in a travel trailer
20 with his wife and three children ages 13, 11, and 20 months. Tr.
21 44. Plaintiff has a high school diploma and one year of college.
22 Tr. 44.

23 Plaintiff has worked as an auto detailer, car salesman and a
24 broadband technician and lineman for a cable company. Tr. 47-48;
25 51. Plaintiff is a certified emergency medical technician, and at
26 the time of the hearing, he was a volunteer firefighter. Tr. 48-50.

27 Plaintiff testified that he is not able to work because he
28 suffers from unpredictable migraines, his hands are often completely

1 numb, and his right leg falls asleep and he experiences shooting
2 pains "every day, all the time." Tr. 52-54. Plaintiff also
3 testified that he takes care of his twenty-month old baby while his
4 wife is at work. Tr. 65. He reported that it is hard for him to
5 pick her up, and he prepares her meals and changes her diapers. Tr.
6 65. He works one 12-hour shift as a volunteer firefighter each
7 week. Tr. 50. During that shift, Plaintiff goes on calls,
8 completes paperwork, and drives the fire trucks. Tr. 50.

9 ADMINISTRATIVE DECISION

10 At step one, ALJ Sherry found that Plaintiff had not engaged in
11 substantial gainful activity since April 26, 2008. Tr. 20. At step
12 two, he found Plaintiff had the severe impairment of bilateral
13 thoracic outlet syndrome; headaches; facial fracture, status post
14 surgery; patellar tendinitis bilateral; major depression, recurrent;
15 and learning disorder. Tr. 20. At step three, the ALJ determined
16 Plaintiff's impairments, alone and in combination, did not meet or
17 medically equal one of the listed impairments in 20 C.F.R., Subpart
18 P, Appendix 1 (20 C.F.R. §§ 416.920(d), 416.925 and 416.926). Tr.
19 21. The ALJ found Plaintiff has the residual functional capacity
20 ("RFC") to perform light work with the following limitations:

21
22 The claimant can lift or carry 20 pounds occasionally and
23 frequently lift or carry 10 pounds. The claimant can sit
24 for six hours and stand or walk for six hours in an eight-
25 hour workday. He can frequently push and pull within the
26 weight limitations specified. He can frequently climb
27 stairs and ramps, but he cannot climb ladders, ropes, or
28 scaffolds. He can frequently kneel, crawl, stoop, crouch,
and balance. The claimant can frequently use his upper
extremities for reaching in all directions (including
overhead), fingering, feeling, and handling. The claimant
can perform simple, routine, and repetitive tasks. He
should be free of fast paced production requirements. He
can have occasional to frequent interaction with the
public.

Tr. 22. In step four findings, the ALJ found Plaintiff's statements regarding pain and limitations were not credible to the extent they were inconsistent with the RFC assessment. Tr. 24. The ALJ found that Plaintiff is incapable of performing past relevant work. Tr. 30. After considering Plaintiff's age, education and work experience, and residual functional capacity, the ALJ determined that jobs exist in significant numbers in the national economy that Plaintiff can perform, such as house sitter, clerical addresser, clerical cutter/paster. Tr. 31.

STANDARD OF REVIEW

In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the court set out the standard of review:

A district court's order upholding the Commissioner's denial of benefits is reviewed *de novo*. *Harman v. Apfel*, 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the Commissioner may be reversed only if it is not supported by substantial evidence or if it is based on legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put another way, substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational interpretation, the court may not substitute its judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, although deference is owed to a reasonable construction of the applicable statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000).

It is the role of the trier of fact, not this court, to resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational interpretation, the court may not

1 substitute its judgment for that of the Commissioner. *Tackett*, 180
2 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
3 Nevertheless, a decision supported by substantial evidence will
4 still be set aside if the proper legal standards were not applied in
5 weighing the evidence and making the decision. *Browner v. Secretary*
6 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
7 substantial evidence exists to support the administrative findings,
8 or if conflicting evidence exists that will support a finding of
9 either disability or non-disability, the Commissioner's
10 determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
11 1230 (9th Cir. 1987).

12 **SEQUENTIAL PROCESS**

13 The Commissioner has established a five-step sequential
14 evaluation process for determining whether a person is disabled. 20
15 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.
16 137, 140-42 (1987). In steps one through four, the burden of proof
17 rests upon the claimant to establish a prima facie case of
18 entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-99.
19 This burden is met once a claimant establishes that a physical or
20 mental impairment prevents him from engaging in his previous
21 occupation. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). If a
22 claimant cannot do his past relevant work, the ALJ proceeds to step
23 five, and the burden shifts to the Commissioner to show that (1) the
24 claimant can make an adjustment to other work; and (2) specific jobs
25 exist in the national economy which claimant can perform. *Batson v.*
26 *Commissioner of Social Sec. Admin.*, 359 F.3d 1190, 1193-94 (2004).
27 If a claimant cannot make an adjustment to other work in the
28 national economy, a finding of "disabled" is made. 20 C.F.R. §§

1 404.1520(a)(4)(I-v), 416.920(a)(4)(I-v).

2 **ISSUES**

3 The question presented is whether substantial evidence exists
4 to support the ALJ's decision denying benefits and, if so, whether
5 that decision is based on proper legal standards. Plaintiff
6 contends that the ALJ erred in assessing his credibility and by
7 failing to properly weigh his treating medical provider opinions.
8 ECF No. 14 at 15.

9 **A. Credibility**

10 Plaintiff argues that the ALJ erred by failing to provide
11 specific reasons for discounting Plaintiff's credibility, and
12 instead provided only boilerplate language. ECF NO. 14 at 18.
13 Contrary to Plaintiff's contention, the ALJ provided detailed
14 reasons that supported the credibility determination. Tr. 24-29.

15 The ALJ is responsible for determining credibility, resolving
16 conflicts in medical testimony, and resolving ambiguities. *Reddick*
17 *v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998). The ALJ's findings
18 must be supported by specific, cogent reasons. *Reddick*, 157 F.3d at
19 722. If a claimant produces objective medical evidence of an
20 underlying impairment, an ALJ may not reject a claimant's subjective
21 complaints of pain based solely on lack of medical evidence. *Burch*
22 *v. Barnhart*, 400 F.3d 676, 680 (9th Cir. 2005). Unless affirmative
23 evidence exists showing that the claimant is malingering, the ALJ
24 must provide "clear and convincing" reasons for rejecting pain
25 testimony. *Burch*, 400 F.3d at 680. General findings are
26 insufficient; the ALJ must identify what testimony is not credible
27 and what evidence undermines the claimant's complaints. *Reddick*,
28 157 F.3d at 722.

1 The reasons the ALJ gives for rejecting a claimant's testimony
2 must be supported by substantial evidence in the record.
3 *Regennitter v. Comm'r of Soc. Sec. Admin.*, 166 F.3d 1294, 1296 (9th
4 Cir. 1999). If substantial evidence exists in the record to support
5 the ALJ's credibility finding, the Court will not engage in
6 second-guessing. *Thomas v. Barnhart*, 278 F.3d 947, 959 (9th Cir.
7 2002). When the evidence can support either outcome, the court may
8 not substitute its judgment for that of the ALJ. *Tackett*, 180 F.3d
9 at 1098. In evaluating credibility, the ALJ may engage in ordinary
10 techniques of credibility evaluation, including considering
11 claimant's reputation for truthfulness and inconsistencies in
12 claimant's testimony, or between claimant's testimony and conduct,
13 claimant's daily activities, claimant's work record, and testimony
14 from physicians and third parties concerning the nature, severity
15 and effect of the symptoms of which claimant complains. *Thomas*, 278
16 F.3d at 958-59.

17 In this case, the ALJ found that despite Plaintiff's assertion
18 his 2004 injuries prevented him from working, he worked full-time
19 after 2004. Tr. 24. Moreover, the ALJ noted that the thoracic
20 outlet syndrome caused by the accident did not worsen significantly
21 over time. Tr. 24. The record reveals Plaintiff admitted that he
22 worked up to 2008, well after his 2004 car accident. Tr. 46-47.
23 Additionally, substantial evidence indicates that while Plaintiff's
24 thoracic outlet syndrome caused fluctuating symptoms (i.e., some
25 treatment notes reveal a flare-up of associated symptoms, other
26 treatment notes contain no mention of associated symptoms), his
27 condition in general did not consistently or progressively worsen
28 over time. Tr. 357; 363; 369; 372; 374. As such, substantial

1 evidence exists in the record supporting the ALJ's finding that the
2 Plaintiff's thoracic outlet syndrome did not prevent him from
3 working.

4 Second, the ALJ thoroughly reviewed the medical evidence in the
5 context of deciding Plaintiff's credibility. Tr. 24-26. It is
6 apparent from a careful reading of the analysis that the ALJ
7 concluded the objective medical evidence does not support
8 Plaintiff's claims about the severity of his limitations, and
9 substantial evidence supports the ALJ's conclusions. Tr. 24-26.
10 For example, Plaintiff's 2004, MRI scan of his cervical and lumbar
11 spine indicated normal anatomy. Tr. 387. Similarly, in June, 2007,
12 Plaintiff complained that he was fatigued, had "wacky
13 conversations," blurred vision and was light-headed upon sneezing,
14 but his CT scan was negative for abnormalities. Tr. 196. The ALJ
15 considered several medical records that indicated no objective
16 medical evidence existed to explain Plaintiff's symptoms. Tr. 24-
17 28. The ALJ's thorough analysis of the objective medical evidence
18 reveals the medical evidence does not support Plaintiff's claimed
19 limitations.

20 Finally, the ALJ reviewed Plaintiff's daily activities and
21 found that his level of activity contradicted his claimed
22 limitations. Tr. 28-29. Substantial evidence supports the ALJ's
23 conclusions. For example, the evidence reveals Plaintiff engaged in
24 activities such as shoveling snow, changing snow tires, caring for
25 a toddler everyday, coaching his child's football team, and
26 regularly working as a volunteer firefighter. Tr. 49-51; 65-66;
27 135-39; 258; 310; 356; 363; 421-22; 550. As the ALJ concluded,
28 Plaintiff's daily activities contradict his claims of total

1 disability. The ALJ's reasons for discounting Plaintiff's
2 credibility were clear and convincing, and supported by the record.

3 **B. Jeffrey J. Emery, DO**

4 Plaintiff contends that the ALJ erred by giving little weight
5 to the February 26, 2010, medical source statement completed by
6 treating physician Jeffrey J. Emery, DO. ECF NO. 14 at 16; Tr. 29.
7 As a general rule, more weight should be given to the opinion of a
8 treating source than to the opinion of doctors who do not treat the
9 claimant. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). Where
10 the treating doctor's opinion is not contradicted by another doctor,
11 it may be rejected only for "clear and convincing" reasons. *Id.*
12 Where the treating doctor's opinion is contradicted by another
13 doctor, the ALJ may not reject this opinion without providing
14 "specific and legitimate reasons" supported by substantial evidence
15 in the record for so doing. *Murray v. Heckler*, 722 F.2d 499, 502
16 (9th Cir. 1983). Where a medical source's opinion is based largely
17 on the Plaintiff's own subjective description of symptoms, and the
18 ALJ has discredited the Plaintiff's claim as to those subjective
19 symptoms, the ALJ may reject that opinion. *Fair v. Bowen*, 885 F.2d
20 at 605. Also, an ALJ may discredit treating physicians' opinions
21 that are conclusory, brief, and unsupported by the record as a
22 whole, or by objective medical findings. *Batson*, 359 F.3d at 1195.

23 In this case, Dr. Emery's opinion was presented in a check-the-
24 box form medical source statement. Tr. 533-38. Dr. Emery opined
25 that Plaintiff is limited to less than a full range of sedentary
26 work. Tr. 533-38. The ALJ gave the opinion little weight because
27 it was based upon Plaintiff's subjective complaints, not supported
28 by objective findings or the overall record, and no exam notes

1 support the findings. Tr. 29. Substantial evidence supports the
2 ALJ's findings. For example, Dr. Emery's notations reflect that the
3 assessment is based upon Plaintiff's subjective complaints: "there
4 is not a lot of objective evidence other than limited joint [range
5 of motion]. EMGs to date have been unremarkable[;]" and "no
6 improvement, in fact subjective worsening seen the past couple
7 years." Tr. 538. Because Plaintiff's complaints were found to be
8 not credible, the ALJ properly gave little weight to Dr. Emery's
9 assessment that was based upon the Plaintiff's discredited claims.
10 Additionally, as acknowledged by Dr. Emery, no objective medical
11 evidence supports his opinion that Plaintiff is limited to less than
12 sedentary work.

13 Finally, Dr. Emery's treatment notes, which are predominantly
14 based upon Plaintiff's self-reports, do not support the less than
15 sedentary opinion. Tr. 309-17; 356-75. An impairment must be
16 established by medical evidence consisting of signs, symptoms, and
17 laboratory findings. 20 C.F.R. § 416.908. An ALJ need not accept
18 an opinion of a physician—even a treating physician—if it is
19 conclusory, brief, and unsupported by clinical findings. *Matney v.*
20 *Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992). In the absence of
21 medical evidence that supports Dr. Emery's opinion, the ALJ's
22 reasons for giving Dr. Emery's assessment little weight were
23 specific and legitimate and supported by substantial evidence.

24 CONCLUSION

25 Having reviewed the record and the ALJ's findings, the court
26 concludes the ALJ's decision is supported by substantial evidence
27 and is not based on legal error. Accordingly,

28 **IT IS ORDERED:**

2. Plaintiff's Motion for Summary Judgment, **ECF No. 14**, is **DENIED**.

The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. Judgment shall be entered for **DEFENDANT** and the file shall be **CLOSED**.

DATED June 18, 2013.

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